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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-652

JOHN HAGAMAN SMITH,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John Hagaman Smith, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 14, 1971, in this proceeding.

CITATION TO OPINION

The original opinion of the Court of Appeals, dated October 15, 1971, has not been reported to date. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals is dated October 14, 1971, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government may call and cross-examine a witness when appraised by his conduct in a former trial that his testimony will be hostile to the government?

2. Whether the Government may cross-examine its witness by reciting before the jury an alleged prior inconsistent statement containing material damaging to the defendant without the Court cautioning the jury that such testimony was admissible only for the purpose of impeaching the witness and not as substantive evidence tending to establish the truth of the subject matter?

STATMENT OF CASE

Jurisdiction of the District Court of the Western District of North Carolina was invoked because Petitioner was charged with receiving stolen goods moving in interstate commerce.

This action was commenced by the filing of a Bill of Indictment on March 16, 1970, which charged that in the first count thereof one, James Kenneth Dula, did unlawfully, wilfully, knowingly embezzle, steal, take and carry away from Houston Motor Lines of Hickory, North Carolina, chattels of a value in excess of One Hundred Dollars ($100.00) which were moving as, were part of and constituted an interstate shipment of freight and express consisting of chairs, sofas and other furniture in violation of Title 18 U.S.C. Section 659.

The other count of the Bill of Indictment charged that the petitioner, John Hagaman Smith, on the same date did unlawfully, wilfully, and knowingly receive and have in his possession chattels in value of excess of One Hundred Dollars ($100.00) which had been stolen and unlawfully taken and carried away from Houston Motor

Lines while moving in interstate commerce from Hickory, North Carolina, to New Jersey knowing that the chattels had been stolen in violation of Title 18 U.S.C. Section 659.

James Kenneth Dula thereafter entered a plea of guilty on March 16, 1970, and was sentenced to a term of three years.

The petitioner, John Hagaman Smith, subsequently, by and through his counsel, entered a plea of not guilty and the case came on for trial initially before a jury on March 18, 1970.

At the March 18, 1970, tril, the Goverment presented James Kenneth Dula (hereinafter referred to as Dula) as a Government witness. (TR. p. 21) He proved to be a very reluctant and contradictory witness; and after making several conflicting statements, including statements that he had been promised a reduction in sentence if he would testify against the petitioner (TR. p. 80) and upon motion of the petitioner, a mistrial was granted. (TR. p. 84)

The case again came on for trial before a jury on March 18, 1971, at which time the petitioner entered a plea of not guilty. (TR. p. 8)

The Government presented its case relying upon conviction primarily upon the doctrine of recent possession.

Thereupon the petitioner presented his defense consisting of an explanation of the possession of the stolen merchandise.

In rebuttal, the Government again called the former witness Dula as a witness and over petitioner's objection (TR. p. 115) allowed the District Attorney to cross-examine him as a hostile witness. In the course of the cross-examination, the witness Dula was questioned at length about an alleged prior statement given by Dula to an FBI Agent. (TR. pp. 147-194). In the process of this

cross-examination, the United States Attorney would read a portion of the prior inconsistent statement, and then ask the witness Dula if he didn't say that; until all of the material facts from said statement were known to the jury. The witness Dula's answer to most of the questions was "I don't remember." (TR. pp. 147-194)

The trial court did not charge the jury before, during or after this cross-examination that the alleged facts stated in the prior statement were for the purpose of impeaching Dula only and should not be considered by the jury as substantive evidence against the petitioner.

The petitioner objected to the evidence and each question as asked.

Upon the completion of the testimony of the witness Dula, the petitioner moved for a mistrial (TR. p. 194) which motion was denied.

At the close of all the evidence, the petitioner again moved for a directed verdict of acquittal and dismissal (TR. p. 282) which motion was denied.

The jury returned a verdict of guilty. (TR. p. 221)

The Court entered judgment that the petitioner be committed to the custody of Attorney General or his authorized representative for a period of five years. (TR. p. 224)

On March 18, 1971, the petitioner filed Notice of Appeal to the 4th Circuit Court of Appeals from the judgment and sentence of the Court. (TR. p. 225).

The UnitedStates Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court on October 14, 1971.

RELEVANT FACTS

The Government, when it called the witness Dula to the stand at the March 18, 1971, trial, already had knowledge of his hostility, and contradictory nature because of its experience with him at the former trial of the same cause on March 18, 1970.

Upon so calling him, the following occurred:

U.S. ATTORNEY: Mr. Dula, come around please.

DULA: I am not taking the stand.

THE COURT: Mr. Dula, come around to the stand.

DULA: I will not take the stand.

THE COURT: Come around to the stand.

Upon being sworn, the following took place:

QUESTION: Mr. Dula, do you know John Hagaman Smith?

ANSWER: Yes

QUESTION: How long had you known him?

ANSWER: I don't know.

QUESTION: Did you know him on or about December 10, 1969?

ANSWER: Yes

QUESTION: Did you see him, John Hagaman Smith, on that occasion or on one of those occasions or during that period of time?

ANSWER: I don't remember whether I saw him on that date or not.

QUESTION: Do you remember testifying concerning this at a prior hearing?

ANSWER: Right

QUESTION: Do you remember someone askingyou this question, "Now, Mr. Dula, on December 9-10, 1969, did you see the defendant, John Hagaman Smith?

MR. WEST: Objection.

COURT: Overruled

QUESTION: Do you remember that question being asked you?

ANSWER: I don't remember that particular question, no.

QUESTION: It probably was asked of you, wasn't it?

ANSWER: I can't say it was or wasn't.

QUESTION: Well, let me ask you this, do you remember answering that question by saying, "Yes, sir."

MR. WEST: OBjection

THE COURT: Overruled.

ANSWER: No, I don't remember.

QUESTION: Where did you see him, Mr. Dula? Do you remember that question?

MR. WEST: If Your Honor please, I would like to enter an objection to this question.

U.S. ATTORNEY: I make a motion that we be allowed to examine him as a hostile witness.

THE COURT: Motion allowed.

From this point in the record over the objection of the petitioner, witness was extensively cross-examined by the Assistant U.S. Attorney and impeached by a series of questions relating prior inconsistent statements made by the Witness Dula, both at the previous trial and ina purported statement given to an FBI Agent upon his arrent. In conducting the cross-examination, the U.S. District Attorney, by repeating the purported prior inconsistent statements before the jury and into the record and then asking the witness Dula if he had made such statements, in effect, introduced to the jury for its consideration the prior statements. Further, the

Court at no time charged the jury that it should consider the prior statement only for the purpose of testing the veracity of the witness Dula and not as tending to prove the subject matter.

REASONS FOR GRANTING WRIT

The decision of the Fourth Circuit Court of Appeals is in conflict with the applicable decisions from other circuits and specifically from the Fifth Circuit.

The decision is completely conflicting to the opinion rendered In United States v. Johnson, 427 Fed 2d 957 (5th Cir., 1970); and United States v. Hicks, 420 Fed 2d 814 (5th Cir., 1970) and the cases cited therein.

The rule covering cross-examination and impeaching of one's own witness when surprised is well settled in Young v. United States, 97 Fed 2d 200 (1938) at p. 205, the Court said that although cross-examination and impeachment of one's own witness by contradictory statement is permissible from surprise testimony . . .

> " it is fundamental that the party offering the witness by really surprised by the testimony. Further it is equally fundamental that the impeaching testimony be admitted not for the purpose of supplying what the witness was expected to, but did not, say, as a basis for a verdict, but only to eliminate from the jury's mind any positive adverse effect which might have been created by the testimony which has surprised the offeror."

Again in United States v. Johnson, 427 Fed 2d 957 (1970) at page 960, the Court states the issues in this manner:

> "The problem presented by the appellant here arising from the occurrence which is not infrequent, where one defendant enteres a plea of guilty and then becomes the star witnesses for the prosecution. Such witnessess sometimes fail to come up to the Government's expectation when they actually take the stand. The temptation is then, of course, very great for the prosecution to attempt to get before the jury any written inculpatory statement previously made by the witness so that the jury can really use the

inculpatory statement made by him as substantive evidence to prove the guilt of the accused." (The Court went on to say that this was reversible error and did reverse the conviction of the defendant.)

The petitioner respectfully submits that this is exactly what the Government did in this case except that in this case the Government did not really anticipate favorable testimony.

Even if the cross-examination and impeachment of the witness Dula was appropriate as permitted here, the trial court should have charged the jury that any prior inconsistent statements made by Dula should be considered solely to test the veracity of Dula and trustworthiness and not as substantive evidence against the petitioner.

At the time the mass of hearsay evidence in this case was received and had its impact upon the jury, the trial court did not caution the jury in spite of frequent vehement objections to the testimony by the petitioner and in spite of the petitioner's motion for a mistrial at the end of such testimony that the contradictory statements could have no legal tendancies to establish the truth of the subject matter. That this is prejudicial error and not harmless error is established by Caldwell v. United States, 194 Fed 2d 808 (1952), United States v. Johnson, 427 Fed 2d 957, (5th Cir., 1970), and Hook v. United States, 37 Fed 2d 212 (1957).

Additionally the petitioner contends that prejudicial error also resulted from the testimony of the witness Dula from the failure of the trial court, even if it was permissible to allow the kind of cross-examination which was done here, to charge the jury that such statements as were brought to their attention from the questions asked from the prior inconsistent statement be considered by them solely to test the veracity and trustworthiness of witness Dula and not as substantive evidence against the petitioner.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1404

United States of America,

Appellee,

versus

John Hagaman Smith,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville.
Woodrow W. Jones, District Judge.

(Argued October 4, 1971. Decided October 14, 1971.)

Before Haynsworth, Chief Judge, Craven, Circuit Judge, and Dupree, District Judge.

Ted G. West for Appellant; Robert G. McClure, Jr., Assistant United States Attorney, (Keith S. Snyder, United States Attorney, on brief) for Appellee.

PER CURIAM:

After full consideration of the briefs and oral argument of counsel, we find no reversible error.

Affirmed.

The decision of the Court below completely condones the procedure repudiated in the above cases and deprives the petitioner of the right to have his case decided by a jury with no knowledge of the tainted testimony of the witness.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-652

JOHN HAGAMAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of having possessed goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 659. He was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

The government's evidence showed that on the night of December 9, 1969, a truckload of furniture moving in interstate commerce was stolen from Houston Mo-

tor Lines of Conover, North Carolina (Tr. II 10-12).[1] On December 11, 1969, local police and F.B.I. agents searched petitioner's home pursuant to a search warrant and found all of the stolen furniture in a storage room attached to petitioner's home (Tr. II 10, 19). One piece of furniture had been unwrapped (Tr. II 17). The furniture had been brought to petitioner's home in the early morning hours of December 10, 1969, by one Kenneth Dula, who pleaded guilty to stealing it prior to petitioner's first trial (Tr. II 55, 62-63).

Petitioner (and other witnesses) testified that he was not at home at that time but was at a gambling club which he managed (*e.g.*, Tr. II 46, 61, 93), and that he knew nothing about the furniture (Tr. II 64, 97). Petitioner further stated that after Dula had telephoned the club to advise him that he had "unloaded some stuff" at his house, petitioner told others to tell Dula to "get his stuff out of my house" (Tr. II 93).

After this testimony, the government called Dula in rebuttal. At the first trial, which ended in a mistrial, Dula had testified that prior to the robbery he had arranged with petitioner to deliver stolen furniture to him (Tr. I 23-26) and that after delivery he had told petitioner in person that he had "left the stuff" (Tr. I 30).[2] However, when Dula was called

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[1] "Tr. II refers to the transcript of petitioner's second trial (March 18, 1971). "Tr. I" refers to the transcript of his first trial which ended in a mistrial on March 18, 1970.

[2] The reasons for the mistrial in the first case, granted at petitioner's request (Tr. I 80, 84), are not clear.

at the second trial, he claimed that he remembered nothing (Tr. II 147 *et seq.*). The prosecutor then moved to examine him as a hostile witness (Tr. II 149) and was permitted to elicit his testimony at the first trial by reading various questions and answers to him and asking whether he remembered the questions and answers (Tr. II 149-166, 170-181).

Petitioner contends that examination of Dula as a hostile witness and use of his prior testimony was error, since the prosecution was not surprised by Dula's hostility. However, unlike the cases cited by petitioner (Pet. 7), the record here indicates no prior awareness by the prosecutor that the witness would refuse to testify as he had previously (Tr. II 145-182). It is well settled that prior testimony is admissible for purposes either of impeachment or refreshment of recollection. *E.g.*, *United States* v. *Guglielmini*, 425 F. 2d 439 (C.A. 2); *Collins* v. *United States*, 383 F. 2d 296 (C.A. 10); *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *Woody* v. *United States*, 379 F. 2d 130 (C.A. D.C.), certiorari denied, 389 U.S. 961. The purported failure to remember here certainly provided an occasion for refreshment of recollection and should also be considered inconsistent testimony giving rise to impreachment.[3]

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[3] Moreover we note that, because of Dula's claimed inability to remember (whether actual or feigned), he was in legal effect "unavailable" as a witness and his prior sworn testimony could constitutionally have been introduced as substantive evidence. See *California* v. *Green*, 399 U.S. 149, 165-170. Although the majority of federal courts still follow the

Petitioner also contends (Pet. 8) that the trial judge erred in refusing to instruct that Dula's prior testimony could be considered only as bearing on his credibility. Petitioner, however, did not seek additional instructions and expressed satisfaction with the charge as given (Tr. II 214-215). Even assuming that petitioner would have been entitled to a limiting instruction as to Dula's prior testimony, the failure of the trial judge *sua sponte* to give such an instruction was not plain error under Rule 52(b), Fed. R. Crim. P. *Benson* v. *United States*, 402 F. 2d 576, 581 (C.A. 9).

"orthodox" rule that prior inconsistent statements are not admissible for the truth of their content, see *United States* v. *Small*, 443 F.2d 497, 498-500 (C.A. 3), few if any of the cases so holding dealt with the situation here, where the prior statement consisted of sworn testimony as to which the defendant had a full opportunity for cross-examination at the time the statement was made. The Second Circuit has long held that, where the prior statement was made under oath, it has a sufficient likelihood of trustworthiness to be admissible as substantive evidence. *E.g.*, *United States* v. *DeSisto*, 329 F.2d 929, 932-934 (C.A. 2), certiorari denied, 377 U.S. 979; *United States* v. *Mingoia*, 424 F.2d 710, 712 (C.A. 2). The view that all prior inconsistent statements should be admissible for the truth of their content has been advanced by most commentators and has been adopted in the Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 801(d). See *United States* v. *Small*, *supra*, 443 F.2d at 498-499.

Therefore it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

HENRY E. PETERSON,
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DECEMBER 1971.

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